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Corporations--State's Right to Amend or Repeal Corporate Charters--Limitations

F. W. L.
West Virginia University College of Law

CORPORATIONS — STATE'S RIGHT TO AMEND OR REPEAL CORPORATE CHARTERS — LIMITATIONS.* — Because of "divers difficulties between the plaintiff bank and others", withdrawal of deposits was restricted and the bank was turned over to the banking commissioner. While it was in his hands, the board of directors drew up a plan of reorganization which was accepted by the commissioner. By this plan each stockholder was assessed fifty dollars per share. The defendant failing to pay his assessment, his stock was sold, resulting in an assessment deficiency for which recovery was sought. The plaintiff justified the assessment under the code provision which confers plenary powers on the banking commissioner,[1] and under the 1935 statute which purports to bind a dissenting stockholder to a reorganization sponsored by two-thirds of the stockholders and approved by the commissioner.[2] *Held*, that the defendant's contract with the bank did not include liability for such an assessment[3] notwithstanding the state's reserved right to repeal or amend corporate charters.[4] *Marshall County Bank v. Wheeling Dollar Savings Trust Co.*[5]

The case qualifies the principle that *any* amendment to a corporate charter by the state becomes a part of the contract between the corporation and its stockholders by reason of advance consent given by the stockholder because he has constructive notice of the state's right to amend.[6] The limitations applied are (1) that the

* The case in comment appeared in the advance sheets subsequent to the writer's completion and submission for printing of the note to be found on page 125 of the February issue of this QUARTERLY. It would have fitted well into that discussion. However, it is to be noted that the note dealt primarily with the subject of amendments from the standpoint of what amendments the state might authorize the corporation to add to its charter, whereas the present comment deals with a case in which the state is acting directly by statute and not through express amendment to the charter. The West Virginia cases there cited really deal with the phase of the subject here presented. However, the limitations on the corporation and on the state are phrased the same by the cases as may be seen by comparing the limitations set forth in the principal case with the analysis of those in the note.

[1] W. VA. REV. CODE (Michie, 1937) c. 31, art. 8, § 29.

[2] *Id.* c. 31, art. 8, § 43 (W. Va. Acts 1935, c. 13).

[3] The court found that this assessment was warranted neither by W. VA. CONST. art. II, § 6, because that section applies only in case of liquidation, nor by W. VA. REV. CODE (Michie, 1937) c. 31, art. 8, § 14 because that section applies only to restore impaired capital of a going concern.

[4] W. VA. REV. CODE (Michie, 1937) c. 31, art. 1, § 8.

[5] 193 S. E. 915 (W. Va. 1937).

[6] Tabler v. Higginbotham, 110 W. Va. 9, 14, 156 S. E. 751 (1931); Germer v. Oil & Gas Co., 60 W. Va. 143, 152, 54 S. E. 509 (1906); Cross v. W. Va. C. & P. Ry. Co., 37 W. Va. 342, 345, 16 S. E. 587 (1892); Cross v. W. Va. C. & P. Ry. Co., 35 W. Va. 174, 177, 12 S. E. 1071 (1891); Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928).

power to amend or repeal corporate charters "may not be exercised directly or indirectly to increase materially the liability of an unwilling stockholder",[7] (2) that the "power should be restricted to those amendments only in which the state has a public interest",[8] and (3) that it cannot be used to permit the majority stockholders "to force on the minority a material change in the enterprise".[9] The limitations defined are those commonly found in the cases limiting the power.[10]

The court avoids the difficulty of distinguishing a public purpose from a private one[11] by assuming the rights affected to be private. A public interest in the reorganization and continued operation of banks would seem to follow from the relation which they bear to the fiscal affairs of the people and the revenues of the state,[12] and if the amendment were proper from that standpoint it might be construed not a material change.[13] Therefore, a reorganization of the bank under the recent statute in and of itself might reasonably be said to bind the stockholder as part of his contract.

The case might have been decided without adverting to the principle of limitation of amending power. It is arguable that there is nothing in the statute authorizing the commissioner to approve a reorganization which requires a *mandatory* assessment. Where the legislature has seen fit to require an assessment it has expressly incorporated in the statute the right to assess.[14] Since one of the recognized advantages of doing business as a stockholder is limited liability, it may be inferred that where an assessment is not expressly provided, it is not authorized. The court, however,

[7] 7 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Rev. ed. 1931) §§ 3688, 3695. But the amendment may make the burden on the stockholder heavier. Tabler v. Higginbotham, 110 W. Va. 9, 156 S. E. 509 (1931); 7 FLETCHER, CORPORATIONS §§ 3663, 3695.

[8] Gary v. St. Joe Mining Co., 32 Utah 497, 91 Pac. 369 (1907); Hinckley v. Schwarzschild, 107 App. Div. 470, 95 N. Y. S. 357 (1905); but see Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928). 7 FLETCHER, CORPORATIONS § 3679.

[9] Natusch v. Irving, 2 Coop. T. Cott. 358, 47 Eng. Rep. 1196 (1824); GOW, PARTNERSHIP (2d ed. 1830) 576; Zabriskie v. Ry. Co., 18 N. J. Eq. 178 (1867); 7 FLETCHER, CORPORATIONS § 3684.

[10] See notes 7, 8, and 9 *supra*.

[11] Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928).

[12] Timmons v. Trust Co., 114 W. Va. 618, 620, 173 S. E. 79 (1933); 1 MICHIE, BANKS AND BANKING (1931) § 2.

[13] *Ex parte* Pittman, 31 Nev. 43, 99 Pac. 700 (1909); 3 MICHIE, BANKS AND BANKING § 7.

[14] See note 3 *supra*.

in order to clarify the situation for future legislative action, holds in effect that if the assessment had been authorized, the statute would not be valid retroactively[15] because such a statute would by way of amendment materially increase the liability of the stockholder — in other words, deprive him of his property without due process of law. The case, therefore, forcibly illustrates the contention that the only real and valid limitation on the state's right to amend or repeal corporate charters is the due process clause of the federal constitution.

F. W. L.

EQUITY — SEQUESTRATION OF PERSONAL PROPERTY PENDING FINAL LITIGATION TO DETERMINE OWNERSHIP.— Suit instituted by *X* and other heirs of *Y* against *A*, administratrix and widow of *Y*, and *B* company, her surety. The bill alleges that *Y* owned Liberty bonds at his death, about which time they came into the hands of *A*, and prays that *A* be required to account for the bonds and restrained from disposing of them. *A* answered, alleging that bonds were in her possession claiming them as a gift from *Y* and disclosing the details of the transfer. *B* company then gave notice of a motion to require *A* to turn the bonds over to some person, whom the court should name, to be held by him until ownership be determined. On return day of the notice *B* filed its answer, which alleges that if the bonds be found to be a part of *Y's* estate, there is "grave danger" that *B* would be liable for the bonds, especially if *A* has disposed of the bonds and is unable to make an accounting, for *A* is without assets from which a recovery could be had. The verified answer then prayed that the court sequester the bonds. Without further showing, the trial court granted the motion. *Held*, one judge dissenting, that the trial court was in error in granting an order of sequestration upon the grounds shown. *Vangilder v. Vangilder; United States Fidelity & Guaranty Co. v. Vangilder.*[1]

Formerly, sequestration had its chief importance as a chancery remedy whereby the property of a person, or of a corporation, was seized by officers of the court of chancery to punish contempts or to compel obedience to the order or decree of the court, final or interlocutory. The modern importance of the sequestration pro-

[15] Note that the similar statute affecting ordinary corporations expressly negatives retroactive effect. W. VA. REV. CODE (Michie, 1937) c. 31, art. 1, § 3.

[1] 193 S. E. 342 (W. Va. 1938).